



**U.S. Department of Housing and Urban
Development**

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March 13, 2013

By email

Kevin J. Plunkett
Deputy County Executive
Westchester County
148 Martine Avenue, 9th Floor
White Plains, NY 10601

Re: *Westchester County Action Plan Certifications*

Dear Mr. Plunkett:

This letter addresses our review of the County's supplemental zoning submissions to the Monitor since our April 20, 2012 letter.¹ We undertook the review to determine whether the submissions, together with the County's earlier submissions discussed in our April 20 letter, provide sufficient evidence to support the County's certifications that it will affirmatively further fair housing ("AFFH"). As you know, federal law requires a satisfactory and accurate AFFH certification to receive community planning and development formula grants from HUD.

Upon review, HUD has determined that the supplemental zoning submissions do not provide sufficient evidence to support the County's AFFH certification. Specifically, the County has failed to conduct a proper analysis of exclusionary zoning practices and to develop a clear strategy to overcome such practices, including litigation. In this regard, the County refuses to apply established legal precedent in examining whether a zoning ordinance has a discriminatory or segregative impact. In addition, the County failed to analyze five out of the six restrictive zoning practices identified by the Monitor for examination. With respect to the one practice reviewed by the County, single-family zoning districts with certain minimum lot size/area requirements, the data examined by the County is too limited to support its conclusions.

¹ HUD undertook a review of the County's responses to the Monitor's May 14, 2012 letter, the District Court's July 26, 2012 Order (the "July 26 Order"), and the Monitor's follow-up requests. The submissions reviewed include all documents sent by the County to the Monitor and HUD on July 6, 2012, July 31, 2012, August 7, 2012, August 8, 2012, August 15, 2012, August 27, 2012, September 6, 2012, September 21, 2012, October 5, 2012, November 21, 2012, and November 22, 2012, and a zoning analysis methodology proposed by the Monitor and accepted by the County on August 7, 2012.

Furthermore, notwithstanding the availability of data to conduct a proper analysis, the County ignored reasonably available evidence of regional housing needs.

A detailed review of the County's zoning submissions and the deficiencies of those submissions follows below.

THE COUNTY'S ZONING SUBMISSIONS

Background

Subsequent to HUD's disapproval of the County's FY2011 Action Plan, the Monitor prepared the Monitor's Report and Recommendation Regarding Dispute Resolution (Amended), dated November 17, 2011 ("the Monitor's Report"), which provided direction to the County on analyzing exclusionary zoning practices and developing a compliance enforcement strategy. In response, the County submitted, by letter dated February 29, 2012, its "Review and Analysis of Municipal Zoning Ordinances in Westchester County" (the "February 2012 Zoning Submission"). By letter dated April 20, 2012, HUD stated that the letter and submission were not sufficient for HUD to reconsider its July 13, 2011 rejection of the County's AFFH certification. In summary, HUD rejected the County's conclusion that its "analysis has not identified specific local zoning practices that have exclusionary impacts[.]"² because the County's methodology was not based on applicable law. In addition, the submission did not reflect an examination of data regarding: (i) the impact that the application of the restrictive zoning practices are having on housing development within the local jurisdictions; (ii) the impact that such practices are having in the composition of their populations; and (iii) whether the local restrictions are properly taking into account regional housing needs. HUD also noted that the County had failed to develop a strategy to overcome exclusionary zoning practices.

The Monitor's Report directed the County to assess the impact of the following six zoning restrictive practices:

1. Restrictions that limit or prohibit multifamily housing development;
2. Limitations on the size of a development;
3. Limitations directed at Section 8 or other affordable housing, including limitations on such developments in a municipality;
4. Restrictions that directly or indirectly limit the number of bedrooms in a unit;
5. Restrictions on lot size or other density requirements that encourage single-family housing or restrict multifamily housing; and

² February 2012 Zoning Submission at p. 13.

6. Limitations on townhouse development.

(collectively, “Restrictive Practices”). *See* Monitor’s Report at pages 13-14. Additionally, the Monitor directed the County to develop a clear strategy to overcome municipal exclusionary zoning practices. The compliance enforcement strategy must include, at a minimum:

- A process for notifying municipalities of zoning issues that hinder the County's obligations under the Settlement and changes that must be made, and if not made, the consequences of municipalities' failure to make them;
- A process to involve municipal decision-makers in consultation regarding changes in zoning and land use restrictions; and
- A description of how these requirements will be included in future contracts or other written agreements between the County and municipalities.

See Monitor's Report at pages 15-16.

By letter dated May 14, 2012, the Monitor found that the February 2012 Zoning Submission: 1) failed to provide a legal basis, facts or analysis that would adequately support the County’s conclusion that exclusionary zoning did not exist in Westchester County; and 2) failed to identify any strategy for overcoming exclusionary zoning practices. To put the County on the right path, the Monitor provided the legal standards for the County to apply in its analysis, and made several data requests to guide a proper analysis. As HUD instructed, the Monitor emphasized that a proper analysis must address both regional needs and the discriminatory or segregative impact.

The County’s July 6, 2012 Submission

It is clear that the County’s July 6th Submission failed to follow the path laid out by HUD and the Monitor in their responses to the County’s February 2012 Zoning Submission. Instead, the County took issue with our guidance, providing that “the analysis ... undertaken is in fact consistent with general planning principles and applicable law and [that the County] must respectfully disagree with your view that the “test” which was a part of that analysis ‘has no basis in law.’” The County stated its legal analysis was supported by a report by the Land Use Law Center entitled “Affirmatively Furthering Fair and Affordable Housing Under New York and Federal Law and Policies[,]” dated June 29, 2012 (the “LULC Report”),³ which it enclosed. The LULC Report states that “[a] local zoning ordinance provides for a well-ordered and balanced community if it contains a wide range of uses, including multifamily housing, accommodates development that would reasonably be expected to locate in the specific

³ Despite the LULC Report’s title, it does not explain how the County would meet its AFFH obligations under the Settlement and federal law.

geographic area, and conforms to these (smart growth) state and federal policies.” The County’s letter (at p. 5) identified this as the basis for its test that it applied to reach its conclusions.

In applying this “test”, the County rejects clearly established legal principles outlined in both the Monitor’s May 14 letter and HUD’s April 20 letter. Specifically, HUD provided the County with well-known Fair Housing Act case law. These cases provide a legal basis for identifying restrictive zoning practices that have exclusionary impacts on minorities and other protected classes,⁴ or where such practices create, perpetuate, or increase segregation. See HUD’s April 20 Letter, at pp. 3-4, and Monitor’s May 14 Letter, at p. 7, citing *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 937 (2d Cir.), review declined in part and judgment *aff’d*, 488 U.S. 15 (1988) (“*Huntington*”); *Metropolitan Housing Development Corp. v. Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978). A zoning ordinance with a discriminatory effect violates the Fair Housing Act unless the municipality can prove that its actions “furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect.” *Huntington*, 844 F.2d at 936 (citations omitted).

In addition, with respect to state law, the County’s “test” represents but one sentence from the LULC Report. The LULC Report acknowledges that the New York Court of Appeals *Berenson* decision and its progeny set the legal standard for exclusionary zoning under New York State Law. See *Berenson v. New Castle*, 38 N.Y.2d 102, 107 (1975). *Berenson* established a two part test for determining the validity of a zoning ordinance: (1) does the zoning ordinance represent a “properly balanced and well-ordered plan for the community[,]” and (2) does the ordinance consider regional needs and requirements. *Id.* at 110.

The County’s “test” ignores the second prong of the *Berenson* analysis, the consideration of regional needs and requirements. In that regard, the County makes a conclusory statement, at p. 5, that it “has found no basis to find that any municipality has not given consideration to regional needs and requirements.” This conclusion ignores the municipal housing allocations prepared by the County’s own Housing Opportunity Commission and included in a 2005 *Affordable Housing Allocation Plan*.⁵ The plan was based on a 2004 study, commissioned by the County, of its affordable housing needs for the years 2000 to 2015. See *Westchester County Affordable Housing Needs Assessment*, Rutgers University Center for Urban Policy Research (2004) (the “Needs Assessment”).⁶ This assessment identified the need for an additional 10,768 affordable housing units by 2015. In its July 6 letter, the County stated that it was not required to consider this evidence because the Allocation Plan was not enacted into law, and because it has

⁴ The Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, prohibits a broad range of discriminatory activities, including discrimination based on race, color, religion, sex, familial status, disability or national origin in the sale, rental or financing of housing or the provision of brokerage or realtor services.

⁵ This Report is available at http://homes.westchestergov.com/images/stories/pdfs/HOUSING_HOAllocation05.pdf (the “Allocation Plan”) (last accessed March 4, 2013).

⁶ This Report is available at http://homes.westchestergov.com/images/stories/pdfs/HOUSING_RutgersReport033004.pdf (last accessed March 4, 2013).

not been specifically incorporated into the Settlement. The Department disagrees. Both the Needs Assessment and the Allocation Plan provide important evidence of the regional needs. As such, the Department expects the County to consider such evidence in examining whether a zoning ordinance considers regional needs and requirements.

In short, the County's July 6 Submission does not provide a basis for HUD to accept the County's AFFH certifications and approve the County's FY2011 and FY2012 Annual Action Plans.⁷ The submission did not comply with the Corrective Actions presented in HUD's April 20 Letter as the County's analysis was not based on applicable law. In this regard, the County's analysis did not reflect an examination of data regarding: (i) the impact that the application of the identified Restrictive Practices are having on housing development within the local jurisdictions; (ii) the impact that such practices are having in the composition of their populations by race, national origins, disability or familial status; and (iii) whether the local restrictions are properly taking into account regional needs. These deficiencies seriously undermine the County's claim that it could not identify *any* zoning practices that may have exclusionary impacts.

The County also failed to include a strategy to overcome exclusionary zoning practices and proposed no zoning changes for eligible municipalities. The July 6, 2012 letter states, at p. 5, that since there are no exclusionary zoning practices in Westchester County, it "cannot formulate a strategy to 'overcome' such provisions which have not been found to exist. This conclusion was non-compliant with the Department's and the Monitor's request to develop a clear strategy to overcome exclusionary zoning practices.

The County's Response to the Court's Order to Respond to Monitor's Data Requests

Because the County's July 6 submission failed to address several data and information requests in the Monitor's May 14 letter, which the Monitor stated would be essential for the County to collect in order to do a proper exclusionary zoning analysis, the United States filed a motion in District Court to compel the County to provide the missing responses.⁸ On July 27, the Court issued an Order directing the County to respond to the Monitor's outstanding requests regarding zoning issues.⁹

After the Court Order, the County provided additional data in response to the Monitor's requests on July 31, August 7, August 8, August 15, August 27, September 6, September 21, and October 5, 2012. The data requested by the Monitor included, among other things, the racial and Latino composition of the population of each zoning district in each municipality, including the

⁷ In a letter dated April 27, 2012, HUD rejected the County's FY2012 AFFH certification and Action Plan, citing the same justifications stated above for rejection of the FY2011 AFFH certification and Action Plan.

⁸ The motion also sought to establish a procedure for the County to either respond or object to future data requests by the Monitor, and for the resolution of any future disputes between the County and the Monitor regarding data and information requests.

⁹ The July 27 Order also established a process for the County to either respond or object to the Monitor's future requests, and for the parties to pursue dispute resolution, where appropriate.

zoning districts with the Restrictive Practices. The Monitor also asked the County to examine the cost of land in the various zoning districts, the developable land available in each municipality, to estimate the number of housing units that could be developed, and to provide the prevailing market rate for multifamily units in each municipality. The Monitor further asked the County to advise whether each municipality had met its allotted number of affordable housing units under the Westchester County Housing Opportunity Commission Affordable Housing Allocation Plan and, if not, to identify any shortfall.

As explained at a meeting held on September 18, and by a letter dated October 1, 2012 (p. 2), the Monitor requested this data to (1) “assess the County's conclusion that through its analysis, it had ‘not identified specific local zoning practices that have exclusionary impacts,’” and (2) “assess whether the County is in compliance with the zoning portion of the Monitor's ...Report[.]” The Monitor requested that the County consider the data it had gathered and review its previous submissions. Based on this review, the County was to revise or make additional submissions regarding its (1) “analysis of whether [local] zoning practices have a discriminatory effect by adversely impacting particular minority groups or by perpetuating segregation ...; and (2) a strategy to overcome exclusionary zoning practices that includes identifying the types of zoning practices that would, if not remedied by the municipality, lead the County to pursue legal action[.]” The Monitor’s intent was for the County to perform an analysis that addressed the identified deficiencies. In response to these final requests, the County made additional written submissions dated November 20 and November 21 (the “November 2012 Submissions”).

The November 2012 Submissions

The County’s November 2012 Submissions, in our view, again fail to analyze the exclusionary impacts of restrictive zoning practices in the County. As stated above, the Monitor specifically requested that the County examine the effect of six Restrictive Practices on housing development within each eligible municipality, and the impact that such practices are having on the racial and ethnic composition of those municipalities. *See* Monitor’s Report (pp. 13-14), HUD’s April 20 Letter (pp. 10-11) and Monitor’s May 14 Letter (p. 8). The November 2012 Submissions, however, inexplicably consist solely of a comparison of the composition of the population in single-family zoning districts with 3 different minimum lot sizes in 6 municipalities (3 eligible and 3 ineligible).¹⁰

¹⁰ Perhaps this is the County’s half-hearted attempt to pursue a recommendation we made during an October 12, 2012 conference call with Chief Deputy County Attorney Jim Castro-Blanco, Deputy County Attorney Carol Arcuri, Associate County Attorney Shannon Brady, and Planning Commissioner Ed Burroughs, that the County compare the zoning schemes of municipalities that are more diverse with those that are targeted for AFFH units under the Settlement, and, that, where there are differences, the County examine whether they were attributable to existing zoning practices. Mr. Castro-Blanco responded that there are no differences among the zoning schemes of the various municipalities, other than those due to infrastructure, and he argued that the zoning schemes of Bronxville (eligible) and Mount Vernon (ineligible) are identical, yet those two municipalities have very different racial and ethnic compositions. We suggested that the County share that data with us, so that we could use it as a basis for a technical support discussion. We also advised that, to the extent that the infrastructure was creating patterns of segregation, the County would need to address it in the County’s Analysis of Impediments to Fair Housing Choice submission. Mr. Castro-Blanco never followed up on the offer of technical assistance. During the call, which was scheduled with the stated purpose of discussing the scope of a proposed technical assistance session, Mr. Castro-Blanco sought to engage HUD representatives in an

The County states that it “identified the percentage of single-race white, single-race black and Hispanic populations in each zoning district with the same minimum lot area requirement in all forty-three municipalities. Then, the County calculated the average for each of these categories for districts in eligible and non-eligible municipalities.” November 21 Submission, p. 2. The County presents three tables, divided by minimum lot size requirements – 5,000 sq. ft., 7,500 sq. ft. and 10,000 sq. ft. - and compares the racial composition of districts of the given lot size in an eligible municipality to the racial composition of districts of the given lot size in an ineligible municipality. The County concludes that “even where the minimum lot zoning requirement is identical, there is still a wide variety of race and ethnicity characteristics.” Based on this small data sample, the County concludes that minimum lot size requirements do not impact race and ethnicity characteristics in all zoning districts throughout Westchester County. *Id.* at pp. 2-3. This conclusion is flawed in several respects.

First, the County’s minimum lot size comparison only looked at single-family districts. As the Monitor pointed out in his May 14 Letter, at p. 5, “multi-family housing has historically been recognized as a barometer in assessing exclusionary zoning claims.” The County’s unwillingness to look at multifamily districts, even while conducting this very narrow review of the effect of minimum lot size zoning, highlights the inadequacy of the November 2012 Submissions.

Second, the County did not explain the rationale for selecting the specified municipalities and districts for comparison. The data the County provided in the February 2012 Zoning Submission shows that Greenburgh and Rye Brook, which are paired here, have very different zoning schemes. For example, Greenburgh has a High Rise Multifamily district and several Multifamily Residence districts. Rye Brook has no such districts. Further, the individual districts within each municipality that the County chose to compare in the letter are dissimilar. The Zoning District Comparison chart shows that both Rye Brook and Greenburgh each have one district with a minimum lot size of 5,000 square feet. In Rye Brook, this district is made up of 14.1 acres and has a population of 175 residents. By contrast, in Greenburgh, this single district is 150.4 acres with a population of 1,733 residents.

Third, the County’s conclusion that minimum lot size zoning does not have an effect on the racial and ethnic composition of districts does not appear to be supported by the County’s own submissions. Specifically, the three charts in the November 2012 Submission reveal a potential correlation that the County ignores. The zoning districts which utilize 10,000 sq. ft. minimum lot size requirements have uniformly low percentages of minority residents in both the eligible and ineligible municipality reviewed. This suggests that 10,000 sq. ft. zoning, regardless of municipality, may have an exclusionary effect. The November 2012 Submission does not examine this data and simply concludes without analysis that minimum lot size zoning does not have an exclusionary effect.

argument as to whether a change in zoning would effect a change in the racial and ethnic composition of the population of a municipality. We advised Mr. Castro-Blanco that the Courts have directed zoning changes to be made as a remedy to address residential segregation, and that we would not argue the merits of that remedy in a call regarding technical assistance.

A singular comparison of two zoning districts based solely on one restrictive practice (minimum lot size) does not provide sufficient information to reach any broad conclusion regarding whether the six restrictive zoning practices may have exclusionary impacts in the County. The County's conclusion ignores most of the data that the Monitor directed the County to review, such as the 93 separate spreadsheets detailing the individual zoning districts within each eligible municipality, including their population and respective racial and ethnic composition, and the impact that these restrictions are having on development costs and the amount of developable land.

The County's letter also states that 15 municipalities have districts with a minimum lot area of 50,000 square feet (1.1 acre) or larger. The Zoning District Comparison chart shows that no ineligible municipality utilizes this mega-lot minimum zoning, suggesting a potential correlation between this type of zoning and segregation. Rather than examining this correlation, the County offers potential justifications for this restrictive practice, stating that these municipalities are located in the New York City water supply watershed; and have topography and infrastructure limitations; or have "unique land features or uses that are suitable for such regulation." November 21 letter, p. 3. Whether the County's explanations are legally sufficient governmental purposes for the zoning ought to be considered after a review of whether the zoning is having a discriminatory effect based on one or more the prohibited bases in the Fair Housing Act. *See Huntington*, 844 F.2d at 926.

With regards to the *Berenson* doctrine, the County did not perform any analysis regarding whether municipalities are meeting the regional needs. The County's presentation was limited to a letter to the Monitor dated November 20, 2012, where the County provided a table showing that none of the municipalities eligible for AFFH units under the Settlement had met its share of the housing need as determined in the 2005 Affordable Housing Allocation Plan. No interpretation of the data was provided.

As with the prior Submissions, the County again failed to develop a strategy to overcome exclusionary zoning practices in compliance with the directions in the Monitor's Report (at pp. 15-16), HUD's April 20 Letter (at p. 12) and the Monitor's October 1 Letter (at p. 2). In the November 2012 Submission, at p. 4, the County justifies its lack of adherence to the directives by stating that it has not identified any zoning ordinance that would "on their face, adversely affect the County's ability to construct fair and affordable housing as required by the Settlement."

In addition, the County identifies a number of conditions precedent to it considering whether litigation would be appropriate. *See* November 21 Submission, at p. 5. The County states that before litigation would be considered, (1) the County must determine it has exhausted its attempts to communicate and cooperate with a municipality; (2) the County must determine that the development of the project is "absolutely necessary" for the County to meet its Settlement obligations; and (3) the County must determine that the municipality is unwilling to cooperate and/or is affirmatively hindering the County's efforts to construct AFFH housing.

The County's set of preconditions is concerning. If the County identifies a zoning ordinance or scheme that may violate the Fair Housing Act, whether or not a specific project is "absolutely necessary" to meet Settlement requirements should not preclude the County from taking action. Such a standard is not consistent with a Fair Housing analysis. Under the Fair Housing Act and other federal housing laws, the County's obligation not to discriminate and act affirmatively to further fair housing in its housing and community development programs go beyond building a finite number of Settlement units. To meet its obligation to affirmatively further fair housing, the County must "conduct an analysis of impediments to fair housing choice within the jurisdiction [AI], take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting that analysis and actions in this regard." See 24 C.F.R. § 91.225. See also 42 U.S.C. § 5304(b). In this regard, it is well known that violations, or potential violations, of the Fair Housing Act are impediments to fair housing choice. See *Fair Housing Planning Guide* at pp. 2-17 ("Any actions, omissions, or decisions which have the effect of restricting housing choices or the availability of housing choices on the basis of race, color, religion, sex, disability, familial status, or national origin."). The County must have a plan to address them.

Additionally, it appears under these conditions that the County could decide to endlessly discuss the topic of development under a given municipality's current zoning scheme, without ever taking any action. This is unacceptable.

In summary, the County's conclusions are still not consistent with applicable federal precedent interpreting the Fair Housing Act and the *Berenson* doctrine. The County's November 2012 Submissions, when examined together with the County's prior submissions, fail to meet the Settlement's requirements for an acceptable AI. The County's conclusions are not based on applicable law, and the proposed strategy to overcome exclusionary zoning practices is inadequate. The County's continued refusal to meet the Settlement's requirements stands as an obstacle to HUD's approval of the County's FY2011 and FY2012 Annual Action Plans.

CORRECTIVE ACTIONS

As HUD's Corrective Actions have not been addressed by the County's collective Zoning Submissions, we reiterate those here. The County must examine any data regarding (1) the impact of the application of the six Restrictive Practices on housing development within the eligible municipalities; (2) the impact such practices have on the racial and ethnic composition; and (3) whether the restrictions properly take into account regional needs. Accordingly, the County is directed to examine whether local zoning ordinances are having exclusionary impacts and/or segregative effects by reviewing the types, quantity and quality of housing presently in the local jurisdiction, proposals for developments (those formally submitted, in progress, and those abandoned), interviews with affected parties, demographic data for the various zoning districts within each local jurisdiction, and an examination of the entire region, particularly demographic data for other jurisdictions with different zoning practices, the housing available,

and of regional housing needs. An examination of proportional statistics, rather than absolute numbers is required. The development of a clear strategy to overcome exclusionary zoning practices is also required.

HUD remains available to provide technical assistance to the County so that it can meet these important requirements.

Sincerely,



Glenda L. Fussá
Deputy Regional Counsel for
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cc: James E. Johnson, Esq.
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